

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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WILMINGTON, DE 19801
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February 12, 2010

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Re: *Farmer v. Brosch, et al.*

C.A. No. 09C-10-135-JRS

*Upon Defendants, Christiana Care Health Services, Inc., &
Christiana Care Corporations's Motion to Dismiss.*

GRANTED.

Dear Counsel:

As you know, this case involves a medical negligence claim in which the plaintiff, Heather Farmer, alleges that the defendants committed various acts of medical negligence during the course of the delivery of her child on July 28, 2007. Plaintiffs' complaint was filed on October 14, 2009, beyond the two year statute of

limitations set forth in 18 *Del. C.* § 6856. On July 21, 2009, plaintiffs' counsel sent a letter to the defendants in which counsel notified defendants of her intent to investigate a specified claim of medical negligence against the defendants. The letter was intended to comply with the so-called "Notice of Intent to Investigate" provision of Delaware's Health Care Medical Negligence Act as a means to temporarily toll the statute of limitations.¹

Defendants, Christiana Care Health Services, Inc. and Christiana Care Corporation (collectively "CCHS"), have moved for dismissal of the complaint pursuant to Delaware Superior Court Civil Rule 12(b)(6) for failure strictly to comply with Section 6856(3), and in support thereof allege two grounds: (1) that plaintiffs' Notice of Intent to investigate was not addressed to CCHS but rather was addressed only to the co-defendant surgeon, Faith A. Brosch, M.D., and her medical practice; and (2) that the Notice of Intent to investigate was not attached to the complaint as required by statute.²

Plaintiffs contend that their Notice of Intent to Investigate does comply with Section 6856(3) and, to the extent the Court has any question regarding this issue, further discovery should be permitted before the Court determines whether plaintiffs have complied with the statute. For the reasons that follow, the Court has determined that plaintiffs have failed strictly to comply with Section 6856(3). Accordingly, CCHS' motion to dismiss must be **GRANTED**.

¹ See 18 *Del. C.* § 6856(3) ("Section 6856(3)").

² CCHS also argues that plaintiffs have failed to allege in their complaint specific acts of negligence against the hospital or its employees and, therefore, any direct claim against CCHS should be dismissed. Because the Court has determined that the plaintiffs have failed to comply with Section 6856(3), the Court does not reach this issue.

A. Standard of Review

In evaluating a Motion to Dismiss under Superior Court Civil Rule 12(b)(6), the Court must assume all well pleaded facts in the complaint to be true.³ A complaint will not be dismissed unless the plaintiff would not be entitled to recover under any reasonable set of circumstances susceptible of proof.⁴ Stated differently, a complaint may not be dismissed unless it is clearly without merit, which may be determined as a matter of law or fact.⁵

B. Plaintiffs Have Failed Strictly To Comply with Section 6856(3)

Section 6856(3) provides:

A plaintiff may toll the above statutes of limitations for a period of time up to 90 days from the applicable limitations contained in this section by sending a Notice of Intent to investigate to each potential defendant(s) by certified mail, return receipt requested, at the defendant(s') regular place of business. The notice shall state the name of the potential defendant(s), the potential plaintiff and give a brief description of the issue being investigated by plaintiff's counsel. The 90 days shall run from the last day of the applicable statute of limitations contained in this section. The notice shall not be filed with the court. If suit is filed after the applicable statute of limitations in this section, but before the 90-day period in this section expires, a copy of the notice shall be attached to the complaint to prove compliance with the statute of limitations.⁶

The Supreme Court of Delaware has held that Section 6856(3) must be strictly

³ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

⁴ *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).

⁵ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

⁶ 18 Del. C. § 6856(3).

construed.⁷ In this regard, the Court noted “Delaware Courts have consistently held that strict construction is particularly important when construing statutes of limitation where ‘the General Assembly has evinced its intent to bar claims filed after the stated time.’”⁸ The Court went on to state, “[w]ith respect to Title 18, Section 6856, this Court has previously held that the plain terms of the statute must be enforced even if they produce a ‘somewhat unfortunate result.’”⁹ And, with regard specifically to the requirement in Section 6856(3) that plaintiffs attach a copy of their Notice of Intent to investigate to their complaint, the Court (under the heading “***Literal Compliance Required***”) held:

Section 6856(3) imposes an affirmative duty on a plaintiff seeking to avoid the impact of the two-year statute of limitations to establish compliance with section 6856(3) *in the complaint*. The statute *directs* plaintiffs to attach a Notice of Intent required by section 6856(3), that was sent by ‘certified mail, return receipt requested.’ Courts have ‘no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions.’¹⁰

In support of its determination that the Notice of Intent must be referenced in and attached to the complaint, the Supreme Court cited to a decision of the Tennessee Court of Criminal Appeals in which that court held “where the prosecut[ion] files an indictment after the expiration of the statute of limitations the indictment must contain factual allegations establishing the tolling of the statute period.”¹¹ In this

⁷ See *Leatherbury v. Greenspun*, 939 A.2d 1284, 1292 (Del. 2007).

⁸ *Id.* at 1292 (citation omitted).

⁹ *Id.*

¹⁰ *Id.* (emphasis supplied)(citations omitted).

¹¹ *Id.* at n.35 (citing *State v. White*, 939 S.W.2d 113, 115 (Tenn. Crim. App. 1996)).

case, plaintiffs acknowledge that they did not attach their Notice of Intent to investigate to their complaint. Instead, they appear to have attached only the certified mail “green cards” which, on their face, make no reference whatsoever to the Notice of Intent to investigate. The complaint itself is silent as to the Notice of Intent to investigate, or any other facts that would “establish[] the tolling of the statute.”¹² In keeping with the clear direction of our Supreme Court that Section 6856(3) is to be strictly construed, especially with respect to “mandatory provisions,”¹³ the Court must conclude that plaintiffs have failed to comply with the tolling provisions of Section 6856(3). Consequently, the Court must further conclude that the complaint was not filed within the applicable statute of limitations. The Court acknowledges that this construction of Section 6856(3) has, indeed, produced an “. . . . unfortunate result,”¹⁴ but there is no room for construction of the clear and unambiguous provisions of this statute, and no discretion on the part of the Court to excuse its mandates.¹⁵

Based on the foregoing, defendant CCHS’ motion to dismiss must be **GRANTED.**

¹² *See id.* at 1292.

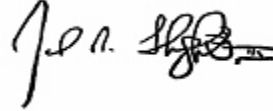
¹³ *Id.*

¹⁴ *Id.*

¹⁵ The Court rejects CCHS’ other argument that the Notice of Intent, by virtue of having been addressed only to Dr. Brosch, failed to comply with Section 6856(3). In accordance with a strict reading of the statute, the Court is satisfied that the Notice of Intent did “state the name of the potential defendant(s) [and] the potential plaintiff, and [did] give a brief description of the issue being investigated by plaintiff’s counsel.” The parties do not dispute that the Notice of Intent to investigate was sent by certified mail to all defendants.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. R. Slights, III". The signature is written in a cursive, somewhat stylized font. The "J" is large and loops around the "R". The "S" is also large and loops around the "L". The "I" is a simple vertical line. The "III" is written as three distinct vertical lines.

Joseph R. Slights, III

Original to Prothonotary